

¹ Page and footnote number references are to the proprietary version of the Initial Brief which was filed on April 28, 1997.

6. p.16, footnote 17, 2d line, replace "Answer" with "Response". Line 3, replace "supplemented," with "modified by *BellSouth's Supplemental Responses*. A copy of the *April 21 Letter* is".
7. p. 17, first paragraph, 3rd line, replace "waives" with "waived."
8. p.19, second full paragraph, 5th line, after "confirm this." add "Exhibit G,".
9. p.21, footnote 19, 2d line, insert ")" after "7362".
10. p.21, first full paragraph, 5th line, after "See", add "Exhibit G,".
11. p.23, carryover paragraph, 4th line, after "suggesting" add ", in effect,".
12. p.24, 3rd bullet, 3rd line, change "9.3 hours" to "0.3 hours."
13. p.29, carryover paragraph, 2nd line, delete parentheses surrounding "Mr. French's Letter."
14. p.29, end of first full paragraph, add footnote "Exhibit F, *April 21 Letter*, at 3 (item (5), referencing supplemental responses to Interrogatory No. 8)."
15. p.29, footnote 29, replace "*BellSouth's First Interrogatory Answers, 23-24*" with "Exhibit E, *BellSouth's Supplemental Responses, 23.*"
16. p.30, last line of page, replace "its *Supplemental Responses to Interrogatories*" with "*BellSouth's Supplemental Responses.*"
17. p.31, first full paragraph, line 7, replace "was to charge" with "to charge."
18. p.31, footnote 31, "Exhibit G" should be "Exhibit E."
19. p.38, footnote 39, 3rd line, replace "provides" with "providers."
20. Exhibit K, page 2, paragraph 5, 4th line, remove the word "because."

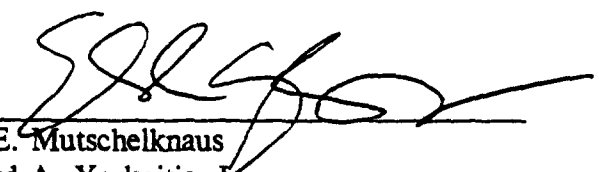
21. Exhibit K, add line at the bottom of page 2 "BellSouth that it would have to pay RNRCs if the customer reconfigured with". (The bottom line on page 1 was repeated at the top of page 2, causing the bottom line of page 2 to drop.)

Respectfully submitted,

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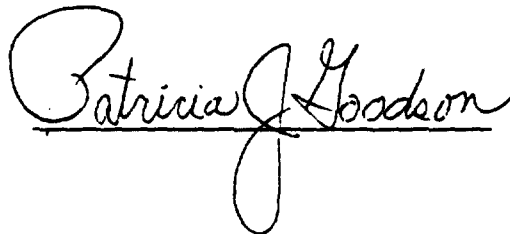
May 5, 1997

CERTIFICATE OF SERVICE

I do hereby certify that on this 5th day of May, 1997, a true and correct copy of the foregoing *Errata* of American Communications Services, Inc., was served via first class mail upon:

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AMERICAN COMMUNICATIONS SERVICES, INC.

Complainant,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.

Defendant.

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File No. E-96-20

INITIAL BRIEF OF
AMERICAN COMMUNICATIONS SERVICES, INC.

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April 28, 1997
(incorporates Errata of May 5, 1997)

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ATTACHMENTS

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- A Excerpts from BellSouth Tariff F.C.C. No. 1
- B Declaration of Scott Layman (excerpted from ACSI's Formal Complaint)
- C Declaration of Deborah Sellers (excerpted from ACSI's Formal Complaint)
- D Exhibit removed because of confidentiality
- E Exhibit removed because of confidentiality
- F Letter of Theodore R. Kingsley, BellSouth Counsel, to Edward A. Yorkgitis, Jr., ACSI Counsel, dated April 21, 1997
- G Respondent's Answers to Complainant's First Set of Interrogatories, dated June 3, 1996
- H Letter of Theodore R. Kingsley, BellSouth Counsel, to Edward A. Yorkgitis, Jr., ACSI Counsel, dated February 24, 1997 -- Exhibit partially removed because of confidentiality
- I Excerpts from Southwestern Bell Telephone Tariff F.C.C. No. 73
- J Respondent's Answers to Complainant's Second Set of Interrogatories, dated July 29, 1996
- K Exhibit removed because of confidentiality
- L Exhibit removed because of confidentiality

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AMERICAN COMMUNICATIONS SERVICES, INC.)

Complainant,)

v.)

BELLSOUTH TELECOMMUNICATIONS, INC.)

Defendant.)

File No. E-96-20

To: The Common Carrier Bureau
Enforcement Division
Formal Complaints and Investigations Branch

INITIAL BRIEF OF AMERICAN COMMUNICATIONS SERVICES, INC.

American Communications Services, Inc. ("ACSI"), by and through its attorneys, and pursuant to Section 1.732 of the Commission's Rules, 47 C.F.R. § 1.732 (1996), and the March 4, 1997, letter ruling of Enforcement Division, hereby files its initial brief on the merits.¹

¹ ACSI reserves its right to file a supplemental complaint for damages following the Commission's decision on the merits pursuant to Section 1.722 of the Commission's Rules.

I. SUMMARY AND INTRODUCTION

This complaint proceeding concerns the manner in which the Defendant, BellSouth Telecommunications, Inc. ("BellSouth"), applies nonrecurring charges to access channel termination location moves ("ACTL moves"). As explained herein, BellSouth routinely imposes grossly excessive nonrecurring charges on BellSouth customers seeking to make an ACTL move in order to purchase ACSI's competitive direct trunked transport ("DTT") access services. It is ACSI's position that the charges are unjust, unreasonable, discriminatory and anticompetitive in violation of both the Communications Act of 1934, as amended (the "Act"), and the Commission's *Expanded Interconnection* rules and orders.²

The manner in which BellSouth applies its nonrecurring charges for ACTL moves violates the just and reasonable standard of Section 201(b) of the Act and the requirements of

² See *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7465 (1992), (requiring nonrecurring reconfiguration charges to be applied in neutral manner for special access services), *recon.*, 8 FCC Rcd 127 (1992), *vacated in part and remanded sub nom. Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994) *further recon.*, 8 FCC Rcd 7341 (1993) ("Special Access Second Reconsideration Order") *on remand*, *Expanded InterConnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154 (1994) ("Expanded Interconnection Remand Order"), *remanded Pacific Bell, et al. v. FCC*, 1996 U.S. App. Lexis 10801 (D.C. Cir. 1996); *Expanded Interconnection with Local Telephone Company Facilities*, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374, 7438 (1993) ("Switched Access Second Report and Order")(citing *Special Access Second Reconsideration Order* requiring same neutrality to be applied to expanded interconnection for switched transport, 8 FCC Rcd at 7362), *vacated in part and remanded sub nom. Bell Atlantic Telephone Companies v. FCC*, 1995 U.S. App. Lexis 12180 (D.C. Cir. 1995).

the *Expanded Interconnection Orders* that nonrecurring charges for reconfigurations be cost-based. (In addition, BellSouth's tariff fails to set forth the manner in which the nonrecurring charges are applied.) For example, BellSouth's ACTL move nonrecurring charges for a DS3 can be as high as \$9,900 for switched access and over \$16,000 for special access.

BellSouth's outrageously high nonrecurring charges bear no reasonable relation to the underlying incremental costs incurred by BellSouth in accommodating an ACTL move.

In addition, exacerbating the anti-competitive impact resulting from the unreasonableness of the charges, BellSouth's application of nonrecurring charges has discriminated impermissibly between those BellSouth customers that reconfigure on BellSouth's own network and those that switch some of their facilities from BellSouth to a competitive access provider ("CAP"). Accordingly, BellSouth's nonrecurring charges for different types of reconfigurations violate the antidiscrimination requirements of Section 202(a) of the Act and the *Expanded Interconnection Orders*.

BellSouth's practices have caused and continue to cause significant harm to ACSI. The unreasonably high and discriminatory nonrecurring charges for ACTL moves unfairly deter and penalize customers that, in the still emerging access transport marketplace, desire to replace BellSouth-provided access facilities with facilities offered by collocated competitive access providers, such as ACSI. Thus the application of the nonrecurring charges effectively foreclose ACSI (and other CAPs) from obtaining business from existing BellSouth customers that are reconfiguring or might consider reconfiguring their access transport

facilities. This has a significant impact on the development of access competition because, without meaningful access to the reconfiguration market, ACSI is relegated to the new facilities market, which is only a small fraction of the total potential access market.

Accordingly, BellSouth should be ordered to bring its nonrecurring charges for ACTL moves down to reasonable cost-based levels and apply them in a non-discriminatory manner. Furthermore, the Commission should act to counterbalance the competitive harm inflicted on ACSI during the lengthy period in which BellSouth has applied unreasonable, discriminatory, and anticompetitive nonrecurring charges. Specifically, every BellSouth customer that rearranged or reconfigured its facilities with BellSouth during the period October, 1994, (when ACSI first went into business) through the present should be given a "fresh look" period in which BellSouth, ACSI, and all providers of access facilities could compete for these customers' business on a level playing field. During this "fresh look" period, to make this opportunity to compete meaningful, the BellSouth customers affected should have the opportunity to reconfigure with another CAP without paying nonrecurring charges *or* termination liabilities. In addition, BellSouth should also be ordered to waive all nonrecurring charges for all *new* ACTL moves during a nine-month period. ACSI should also be granted its attorney's fees and expenses. Finally, following the filing of a supplemental complaint, ACSI should be awarded damages.

II. PROCEDURAL HISTORY

ACSI filed its Formal Complaint against BellSouth with the FCC on February 15, 1996.³ BellSouth submitted its Answer and affirmative defenses on April 8, 1996, and ACSI made its Reply on May 6, 1996. Each party served discovery on the other, and ACSI filed two motions to compel BellSouth to respond completely to ACSI's interrogatories. Status and discovery conferences were held by the Enforcement Division on January 30 and February 27, 1997, during which outstanding discovery issues were resolved and BellSouth was ordered to complement its discovery responses. On March 4, 1997, in a letter ruling, the Division established a briefing schedule for this proceeding, setting April 28, 1997, as the date for initial briefs.

III. STATEMENT OF FACTS

A. The Parties

Plaintiff ACSI, a Delaware corporation employing over 400 people, is engaged in the business of providing competitive access services to carriers and end-user customers located primarily in the southern and southwestern regions of the United States. ACSI also has entered into interconnection agreements under Section 252 of the Act with incumbent local exchange carriers ("ILECs") in over fifteen states, including all nine BellSouth states, and

³ ACSI clearly and unequivocally sought the recovery of damages in its Formal Complaint. Formal Complaint ¶¶ 59-66. ACSI also reserved its rights under Section 1.722 of the Rules to submit a supplemental complaint for damages after a decision on the merits of its Formal Complaint. *Id* at ¶ 66.

has begun to provide facilities-based and resold local exchange services. Through its subsidiaries, ACSI has constructed over twenty-nine fiber access networks in twenty states, including Florida (Jacksonville, Tampa), Louisiana (New Orleans, Shreveport), Kentucky (Louisville, Lexington), Alabama (Birmingham, Mobile and Montgomery), Tennessee (Chattanooga), Mississippi (Jackson) and South Carolina (Charleston, Columbia and Greenville) in the BellSouth region. ACSI offers services both directly to customers and by means of collocating and interconnecting with ILECs such as BellSouth.

BellSouth is the dominant ILEC in the southeastern United States, serving the overwhelming majority of end-user and access customer traffic in nine states: Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. Under the provisions adopted by the Telecommunications Act of 1996 ("1996 Act"), BellSouth is an "incumbent local exchange carrier" subject to the interconnection and collocation requirements of Section 251. 47 U.S.C. §§ 251(c)(2) & (6). BellSouth also continues to be subject to the interconnection obligations imposed by the Commission in its *Expanded Interconnection Orders*. See 47 U.S.C. § 251(g).

B. Interstate Access

Interstate access occurs on both the originating and terminating ends of an interstate call. The LEC facilities on both ends serve largely the same purpose: to deliver the call between (1) the end office serving the caller or the called party and (2) the facilities of the interstate long-distance carrier that will carry the call, *i.e.*, the carrier's "point of presence"

ACSI's principal focus in its complaint is on the charges BellSouth assesses for its customers' reconfiguration of entrance facilities. The level of these charges directly affects ACSI's ability to compete in the access market.⁵

Until several years ago, LECs faced little or no competition in offering the local access facilities and services used in the provision of interstate telecommunications. Recent technological and regulatory changes have facilitated the development of competition in the provision of interstate special and switched access services. Several years after fiber-optic-based CAPs began to offer access services to larger business customers in the central business districts of a number of major cities, the FCC adopted rules and policies in its *Expanded Interconnection* proceedings to enhance the ability of CAPs to interconnect with LEC end office facilities and to enlarge the universe of interstate access customers that the CAPs could service.

C. The Requirements of the Expanded Interconnection Orders

A principal purpose of the FCC's *Expanded Interconnection Orders*⁶ was to encourage local access competition by ensuring competitively neutral interconnection practices by the LECs. Addressing the levels of nonrecurring charges for reconfigurations, the Commission announced clear directives designed to prevent these charges from being

⁵ See Section III.D., *infra*,

⁶ See n. 2, *supra*.

Moreover, while the Commission noted that "[t]he LECs incur legitimate costs in making service changes, and *in general* should be able to recover these costs from interconnectors and their customers," the FCC also emphasized that

[there is an] exception . . . when the LEC does not recover non-recurring reconfiguration costs from its own special access or switched transport customers. In that case, the LEC must *not* charge customers who reconfigure in order to take service from an interconnector *more than an amount reflecting the difference between the costs of the two different types of reconfigurations*.¹⁰

In short, if BellSouth offers waivers of nonrecurring charges to any of its customers that reconfigure while remaining with BellSouth, the nonrecurring charges charged to customers that switch to interconnectors must reflect *only the differences* in the costs of the two different types of reconfiguration.

D. BellSouth's Nonrecurring Charges for ACTL Moves

ACSI has constructed local fiber networks in selected markets that enable it to establish expanded interconnection arrangements with BellSouth in order to provide dedicated transport access services, both switched and special, such as entrance facilities, in competition with BellSouth. When an access customer of BellSouth wishes to reconfigure existing entrance or other access facilities to take access from an interconnector or CAP, such as ACSI, the reconfiguration involves a change in the access channel termination

¹⁰ *Expanded Interconnection Remand Order*, 9 FCC Rcd at 5211 (emphasis added).

location ("ACTL").¹¹ This type of reconfiguration is referred to by BellSouth in its tariff simply as a "move." BellSouth charges the customer nonrecurring reconfiguration charges for the ACTL move. *See* BellSouth Tariff F.C.C. No. 1, §§ 6.7.7(B) and 7.4.5(B), attached hereto as part of Exhibit A. BellSouth considers all reconfigurations by its customers with a CAP as a change in customer location, warranting the imposition of nonrecurring charges, even if the CAP is collocated in the BellSouth office currently serving the customer. *See id.* § 6.7.7(B) para. 2.

BellSouth has tariffed distinct nonrecurring charges that apply to ACTL moves and reflect the capacity of the dedicated transport circuits that are redirected: DS0, DS1, and DS3. DS1 circuits have 24 times the capacity of a DS0 voice grade circuit. DS3 circuits have 28 times the capacity of a DS1 circuit and 672 times the capacity of a DS0 circuit. The BellSouth tariffs establish two rates for each type of circuit that is reconfigured pursuant to an ACTL move in addition to a cross-connect charge: (1) a "per customer request" rate for any number of circuits of a given type that are reconfigured and (2) a "per circuit reconfigured" charge for each circuit of a given type that is reconfigured. *See id.*, §§ 6.8.8(J) and 7.5.17.

The rate regulations in BellSouth's Tariff F.C.C. No. 1 provide that, in the case of an ACTL move, "service reconfiguration charges are applicable per customer request and circuit

¹¹ The links between the customer, BellSouth's end office[s], and the SWC remain the same. *See* n.4, *supra*, and accompanying text.

above the DS3 rate alone (\$240.90).¹² A single special access DS3 nonrecurring charge applicable to ACTL moves is \$151.90, *i.e.*, the cross-connect charge, under BellSouth's currently effective tariff. As explained in the French Letter, if nonrecurring charges are applied at the DS0 and DS1 levels for moving a fully utilized special access DS3, the total charge becomes \$16,531.90 -- an increase of over 10,000%.¹³ A DS1 special access reconfiguration, calculated as per paragraph 24, would be \$788.90. *See id.* ¶¶ 5-6. The level of these charges for a single DS3 when multiple DS0 and DS1 nonrecurring charges are included imposes a significant disincentive on IXC's or other large customers that desire to reconfigure with ACSI for DTT access.

BellSouth thus makes clear in the letter from Mr. French, in a way that is *not* made clear in the tariff, that it would impose multiple DS0 nonrecurring charges when an IXC customer redirects DS1 and DS3 entrance facility circuits to ACSI's collocated facilities. The tremendous practical and monetary impact of imposing multiple DS0 and DS1 nonrecurring charges for an ACTL move involving DS3s is plain to see.

¹² Were the DS3 only half utilized, with 14 subtending DS1s and 336 subtending DS0s, the charge would be \$5,070.90 -- pursuant to the method outlined in the French Letter.

¹³ Were the DS3 only half utilized, with 14 subtending DS1s and 336 subtending DS0s, the charge would still be \$8,341.90, pursuant to the French Letter. A DS3 that was only *one quarter* channelized (7 subtending DS1s and 168 subtending DS0s) would still carry a \$4,246.90 charge.

E. The Functions Underlying the Charges

No cost justification exists for the enormous charges that result from the application of multiple DS0 and/or DS1 nonrecurring charges to a customer's ACTL move of DS3 or DS1 circuits from BellSouth to a CAP. *Id.* ¶¶ 9-13. An ACTL move of a customer's LEC-provided dedicated circuits to a collocated CAP facility involves labor, engineering, and recordkeeping changes. When an IXC customer seeks to reconfigure a DS3 (or DS1) DTT transport circuit to a collocated CAP facility, as illustrated in Diagram 1 attached to Exhibit B, *Layman Declaration*, a BellSouth technician must physically detach the DS3 (or DS1) jumper cable from the cross-connect panel or multiplexer attached to the facility that goes to the IXC's point of presence, and must attach the cable to the CAP's cross-connect panel or multiplexer that is collocated within the LEC central office. An experienced technician should be able to accomplish this task in under 2 hours. No other physical labor is required. *Id.* ¶ 10. ACSI understands this activity to be covered by BellSouth's cross-connect charge.

BellSouth also has recordkeeping requirements associated with an ACTL move. Essentially, the LEC will have to input changes in two databases. One is its Carrier Access Billing System ("CABS"), which maintains and updates customer billing data, to reflect the changes in the customer's billing information. These recordkeeping adjustments are keyed in manually, typically by a single employee within a circuit provisioning center. *Id.* ¶ 11. The CABS inputs reflect changes to individual DS0 circuits.

BellSouth must also update its Trunk Inventory Record Keeping System (TIRKS) database, an on-line recordkeeping system for circuit provisioning. In processing the IXC's ACTL move request, TIRKS records the change in the "Z" (terminating) coordinates of the circuit; determines the transmission facilities and equipment needed for the new circuit; updates the assignment status of the equipment, facilities and circuits as the order is processed; specifies the test requirements for the new circuit; and modifies the equipment inventory, accordingly. These TIRKS adjustments reflect changes to the high-capacity entrance facility trunks, and are made at the DS1 level for a DS1 ACTL move and at the DS3 level for a DS3 ACTL move. As ACSI's Director of Program Management states, BellSouth personnel have explained to him that a competent BellSouth terminal operator should be able to input the TIRKS and CABS changes for a channelized DS1 in under 1.5 hours. The database changes for a channelized DS3 should take under 40 hours for a competent operator. *Id.* ¶ 12. As detailed below, for a fully channelized DS1 and DS3, BellSouth would charge its customers as though the work takes *15 and 400 hours*, respectively, almost *ten* times as long.¹⁴

F. BellSouth's Application of the Nonrecurring Charges for ACTL Moves

The record before the Commission affirmatively shows that, in assessing nonrecurring charges for ACTL moves, BellSouth imposes, at most, a single DS1 or DS3 charge when

¹⁴ BellSouth spreads these recordkeeping and related functions over several work groups. See discussion of these functions, many of which appear duplicative based on the information provided by BellSouth in discovery, at pp. 23-25, *infra*.

Through April of 1996, BellSouth's tariff provided further that, if a BellSouth customer reconfigured its access configuration with BellSouth to take BellSouth's LightGate or SmartRing service, BellSouth waived the nonrecurring charges altogether, in what it called the Network Optimization Waiver. See Exhibit A, §§ 7.4.20(A)(1) & (4), and 7.4.20(B). BellSouth has used this waiver program to accommodate reconfigurations by interexchange carriers with multiple POPs in the same market, for example following the acquisition of one IXC by another. Exhibit C, *Sellers Declaration*, ¶ 5. Specifically, the NOW program permitted IXCs to move circuits from one POP to the other without paying a nonrecurring charge. This waiver policy created a non-cost-based disincentive to customers that desire to reconfigure their networks to take transport service from ACSI and other collocated CAPs since this would incur the imposition of costly nonrecurring charges. See *id.* ¶ 4.

Section 7.4.20 of BellSouth's Tariff F.C.C. No. 1 permitted an IXC with one or more POPs in the same market to achieve what is, for all practical purposes, an ACTL move without incurring a nonrecurring reconfiguration charge. Specifically, it is ACSI's understanding that, under the NOW program, BellSouth placed the multiple IXC POPs on a ring topology along with a BellSouth serving wire center. (At least two IXC locations are necessary in order for the IXC to opt for the ring topology.) Once the IXC's POPs were on the ring, the IXC could redirect all of the access traffic to one of its points of presence without incurring any nonrecurring charges for the reconfiguration by virtue of the Network Optimization Waiver. Thus, the IXC could reconfigure all of its traffic to a single POP and

avoid the nonrecurring charges that would otherwise apply. However, were that IXC to seek to reconfigure all of its traffic from its multiple POPs to that same POP through a CAP, BellSouth would have applied, and does apply, nonrecurring charges down to the DS0 level, depending on how the circuit is channelized. *Id.*, ¶ 5.

As noted above, under BellSouth's interpretation of its tariff language, a customer is faced with not only a DS3 nonrecurring charge, but multiple DS0 and DS1 charges, if it rolls over a DS3 to a CAP. In comparison, if the customer reconfigures with BellSouth, then only a single DS3 nonrecurring charge is applied -- or the nonrecurring reconfiguration charge may be waived entirely. Similarly, if the customer rolls over a DS1 to a CAP, it may face multiple DS0 nonrecurring charges in addition to one DS1 nonrecurring charge (despite the silence of the tariff on this point), whereas one DS1 nonrecurring charge, or none, in the case of a waiver, would be imposed to reconfigure a DS1 from one BellSouth service to another.

BellSouth has not treated all collocated CAPs in an equal fashion. See Letter from Joseph R. Wilson, Sales-Vice President, Industry Services, BellSouth, to Thomas P. Byrnes, Regional Vice President, TeleCommunications Group, Inc. ("TCG"), dated June 30, 1994 ("Wilson Letter"), attached as part of Exhibit C. At pages 2-3 of the *Wilson Letter*, BellSouth informed TCG, a CAP, that a customer would pay, at most, a single DS3 nonrecurring charge for the rollover, *i.e.*, ACTL move, of DS3 service from BellSouth to TCG. Similar treatment has not been available to ACSI's potential customers when they

contemplate reconfiguring their networks to take DS3 service from ACSI rather than BellSouth. Exhibit C, *Sellers Declaration* ¶ 6.

From an operational and cost standpoint, there are no significant differences between redirecting high capacity (DS1 or DS3) dedicated transport circuits to a different customer location through BellSouth, and redirecting them to a collocated CAP's facilities. Similarly, there are no significant differences in BellSouth's costs when an IXC reconfigures with one collocated CAP as with another CAP. In all cases physical rerouting of circuits is done at the DS1 or DS3 level. Exhibit B, *Layman Declaration* ¶ 14. This is confirmed by BellSouth's responses to ACSI's interrogatories. See BellSouth's Answers to ACSI's First Set of Interrogatories, dated June 3, 1996 ("BellSouth's First Interrogatory Answers") at 4-16 (Interrogatory No. 2). A copy of BellSouth's First Interrogatory Answers are appended hereto as Exhibit G.

Moreover, the database programming necessary to reflect changes in trunk assignments is similar for traffic rerouted to a different location on the customer's premises through BellSouth, and for traffic rerouted to any collocated CAP's facilities. Exhibit B, *Layman Declaration*, ¶ 15. Similarly, BellSouth's responses to ACSI's interrogatories confirm this. Exhibit G, *BellSouth's First Interrogatory Answers* at 4-16. Any differences in the modifications made in the carrier billing database are *de minimis*. Exhibit B, *Layman Declaration* ¶ 16.

IV. BELLSOUTH'S NONRECURRING CHARGES FOR ACTL MOVES ARE UNJUST AND UNREASONABLE

BellSouth is violating Section 201(b) of the Act which dictates that the LECs impose just and reasonable charges for their services. 47 U.S.C. § 201(b).¹⁸ In addition,

¹⁸ BellSouth has violated Sections 203(a) and (c) by charging, demanding, collecting and receiving compensation different and greater than that specified in its Tariff F.C.C. No. 1 for nonrecurring charges applicable to customers that request ACTL moves so that they may obtain their access service from a CAP. Section 203(a) of the Act requires that every carrier, except connecting carriers, file schedules

showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this [Act 47 U.S.C. §§ 151 et seq.] when a through route has been established, whether such charges are joint or separate, and showing the classifications, *practices, and regulations affecting such charges.*

47 U.S.C. § 203(a) (emphasis added). Section 203(c) of the Act further requires that a carrier shall not charge, demand, collect, or receive a greater or less or different compensation from that specified in its tariff. 47 U.S.C. §203(c).

When an existing customer reconfigures with a CAP, BellSouth is imposing multiple reconfiguration nonrecurring charges per circuit in a manner which is *not* described in the rate regulations of its tariff on file with the FCC. Exhibit B, *Layman Declaration* ¶ 7. BellSouth is charging, demanding, collecting, and receiving multiple DS1 and DS0 nonrecurring charges *in addition to* a DS3 nonrecurring charge when an IXC customer redirects a DS3 circuit to a CAP's collocated facilities. At the very least, the BellSouth tariff is ambiguous about how the nonrecurring charges are applied. Provisions in BellSouth's tariffs that are ambiguous must be construed against BellSouth consistent with well-settled principles of tariff construction. *See, e.g.,* AT&T Communications, 10 FCC Rcd 1664, 1665 (1995); American Satellite Corporation v. MCI Telecommunications Corp., 57 FCC 2d 1165, 1167 (1976, *citing* United States v. Gulf Refining Co., 268 U.S. 542 (1925) ("It is well settled that where

(continued...)

BellSouth's nonrecurring charges contravene the *Expanded Interconnection Orders* of the Commission which require that all nonrecurring reconfiguration charges paid by interconnectors or their customers must be set *no higher than* cost-based levels.¹⁹ The Commission's *Expanded Interconnection Orders* survive the enactment of the Telecommunications Act of 1996. 47 U.S.C. §§ 251(g) and (i).

The nonrecurring charges that BellSouth imposes for an ACTL move involving a DS1 or DS3 dedicated circuit bear no reasonable relation to the direct costs imposed on a LEC by a customer's reconfiguration to a CAP facility. Essentially no capital expenditures are required. This fact is reflected in BellSouth's cost study, which was submitted to the Commission by BellSouth when modifying its nonrecurring charges in early 1995. See *Exhibit G, BellSouth's First Interrogatory Answers*, answer to Interrogatory No. 2 and attachment ("BellSouth Cost Study"). The *BellSouth Cost Study* indicates that all of

¹⁸(...continued)

there is an ambiguity, uncertainty, or reasonable doubt as to which of two constructions should prevail in a tariff schedule, the ambiguity should be resolved against the maker of the tariff and in favor of the customer."). BellSouth may not charge nonrecurring charges in excess of the charge for the actual circuit being reconfigured, *i.e.*, DS3 or DS1 in the case of an ACTL move. Its doing so violates Sections 203(a) and (c).

¹⁹ *Switched Access Second Report and Order*, 8 FCC Rcd at 7439 (citing *Special Access Second Reconsideration Order*, 8 FCC Rcd at 7362). See also *Expanded Interconnection Remand Order*, 9 FCC Rcd at 5210-11. The *Special Access Second Reconsideration Order* stresses that "[reconfiguration nonrecurring] charges are to reflect only the costs incurred for the particular type of reconfiguration being implemented." 8 FCC Rcd at 7362.

BellSouth's costs underlying its nonrecurring charges for ACTL moves are attributable to labor.

The issue before the Commission in this proceeding is whether, under Section 201(a), the labor costs associated with the access facilities are just and reasonable. As noted earlier, the nonrecurring charge (including cross-connect) for a fully channelized DS3 special access facility is \$16,531.90 and for a fully channelized DS1 special access facility is \$788.90. See Section III. D, *supra*.²⁰ The *Layman Declaration* explains that the total time it takes for BellSouth to make the record changes required is approximately 40 person-hours and 1.5 person-hours, respectively. Exhibit B, ¶¶ 9-11. After adding in the two hours for the cross-connect, the total hourly labor rate for the nonrecurring charges is approximately \$410 per hour for a DS3 and \$225 per hour for a DS1. These effective labor rates are on their face unjust and unreasonable and so are the charges based upon them.

ACSI understands that BellSouth maintains that the *BellSouth Cost Study* more accurately reflects the total time to reconfigure a DS3 or DS1 facility, rather than the admissions made by BellSouth's personnel to Mr. Layman, regardless of the extent to which the facility is utilized. Specifically, BellSouth insists that, prior to recently instituted minor mechanizations of the reconfiguration process, it took BellSouth personnel an average of *four*

²⁰ In addition, the charges for a special access DS3 facility that is one-half or one-quarter utilized are \$8,341.90 and \$4,246.90, respectively. The nonrecurring charges for a fully and 50-percent utilized switched access DS3 facility are \$9,900.90 and \$5,070.90, respectively. See nn. 12-13, *supra*.